IN THE

Supreme Court of the United States

October Term, 1966.

No. [redacted] 78 [redacted]

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291, ITS OFFICERS AND MEMBERS,
Petitioners,

v.

PHILADELPHIA MARINE TRADE ASSOCIATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Local 1291, International Longshoremen's Association, its officers and members, respectfully pray that a Writ of Certiorari issue for review of the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled matter on November 17, 1966. Said judgment affirms an Order of the District Court for the Eastern District of Pennsylvania holding petitioners in contempt for non-compliance with a prior Order of the

District Court, which is now pending for review on Certiorari before this Court: *International Longshoremen's Association, Local 1291, Petitioner vs. Philadelphia Marine Trade Association,* October Term, 1966, No. 892; certiorari granted, February 13, 1967.

OPINION AND ORDERS OF THE COURTS BELOW.

The Order of the District Court for the Eastern District of Pennsylvania (226a-27a), unreported, is printed as Appendix B hereto (p. 23). The opinion of the Court of Appeals for the Third Circuit, reported at 368 F 2d 932, is printed as Appendix C hereto (p. 25). The judgment of the said Court of Appeals is printed as Appendix D hereto (p. 29). The Order of the Court of Appeals denying rehearing is printed as Appendix E hereto (p. 30).

JURISDICTION.

The judgment of the Court of Appeals was entered on November 17, 1966 (p. 29). The order denying rehearing was entered on January 6, 1967 (p. 30). The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED.

Where the Trial Court entered an Order without findings "enforcing" an arbitrator's award involving a labor dispute, and refused to state whether the order enjoined any strike or work stoppage, and thereafter a "wildcat" strike occurred whereupon the Court held a contempt hearing upon an ex parte "report" of the employer without requiring the employer to file a complaint specifying the alleged contempt, and thereafter, despite a finding that the union was not responsible for the strike and was doing all possible to terminate the strike, nevertheless, held the union in contempt for the "mass action" of its members; did not the District Court commit fundamental error in:

(a) holding a hearing upon an ex parte report without requiring the filing of a written complaint as required by the F.R.C.P.;

(b) refusing a jury trial under the Act of 1948;

(c) holding the union in contempt because of the *"mass action"* of certain of its members who engaged in a "wildcat strike";

(d) holding the union in contempt despite the lack of jurisdiction in the Court to entertain the proceedings?

STATUTES AND RULES INVOLVED.

The statutory provisions and rules involved are: Norris-La Guardia Act, 29 U.S.C.A. 104, Act of June 25, 1948, c. 645, 18 U.S.C.A. 3692; Federal Rules of Civil Procedure 3, 4, 8, 38 (a), 65 (d).

STATEMENT OF THE CASE.

This Court has already granted certiorari in this case[1] of an Order of the Court below which enjoined a work stoppage. The instant phase of the case involves a contempt order of the Court below which fined the union $100,000.00 per day because of a "wildcat" strike alleged to be in violation of that Order of the lower Court, which this Court has now taken for review.

This case stems from an arbitration decision concerning a labor dispute which occurred on April 26, 1965.[2] Thereafter, another dispute arose on July 30, 1965, and the union sought arbitration, but the employer refused, contending that the earlier decision applied and they obtained an Order from the Court below "enforcing" the arbitrator's award.[3] Another dispute arose on February 24, 1966, with another employer, which precipitated a "wildcat" strike. The union attempted to prevent the strike and after it was started, tried to terminate it.[4] The union asked for arbitration, whereupon the employers, because of that request, "reported" orally, ex parte, to the District Judge

1. ILA v. PMTA, Oct. Term No. 892—Certiorari was granted February 13, 1967. The case is expected to be argued during the Fall Term of 1967.

2. A fuller presentation of the underlying factual picture is set forth in the Petition for Certiorari already granted.

3. The arbitrator's decision simply interpreted a clause of the agreement. It did not direct any return to work or relate to a work stoppage. The lower Court's Order simply provided that "the arbitrator's award will be enforced". Union counsel requested clarification as to whether the Order enjoined a strike or work stoppage, but the Court arbitrarily refused to reply or to make findings as required by the Rules.

4. The employer admitted that the union efforts were "sincere" (81a) and the employer's counsel admitted that the union was doing all in its power to terminate the work stoppage. (7a, 223a-224a). The Court found as it had to, that the strike was a "wildcat," but fined the union on the ground it was liable for the "mass action" of the members.

demanding that the union be held in contempt. No pleading or other document was filed, but the Court, nevertheless, scheduled a contempt hearing for March 1, 1966.

At the outset of the hearing the union moved that the employers be required to file a pleading setting forth in what manner the union was supposed to have violated the Court's Order so that the union could file an Answer and prepare a defense. (20a-22a). The Court summarily denied this Motion (20a). The union then moved for a dismissal on the ground that the entire proceeding was in violation of Section 4 of the Norris-LaGuardia Act and of the Supreme Court's decision in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, but the Court peremptorily denied this Motion also (21a) and directed the parties to proceed with the testimony. The union then filed a written application for a jury trial under the Act of 1948 but the Court summarily denied this Motion also.

The employers conceded as the testimony proved that the union made every sincere effort to prevent and terminate the work stoppage (81a, 223a-224a). The employers contended, however, that the union's demand for arbitration alone was a violation of the District Court's Order. The District Judge rendered an oral decision from the bench holding the union and its officers guilty of contempt on the ground that the union was responsible for the "mass action" of its members.

The union filed its Petition for Certiorari from the injunction Order of September 15, 1965 and this Court granted that Petition on the 13th day of February, 1967. The instant Petition relates to the subsequent contempt Order flowing from the foregoing injunctive Order.

REASONS FOR GRANTING THE WRIT.

I. Proceeding With a Contempt Hearing Upon the Oral "Report" of a Party Without Requiring a Complaint Violated F.R.C.P. 3; Failure to Serve Such a Written Complaint Upon Defendant Violated F.R.C.P. 4; Failure to Advise Defendant by Written Complaint of What He Was Required to Defend Against Violated F.R.C.P. 8; and the Failure to Clarify and Make Findings With Respect to the Injunctive Order Alleged to be Breached, Violated F.R.C.P. 52(a) and 65(d). Such Action by the District Judge is a Prejudicially Substantial Departure from Proper Judicial Procedure, Calling for the Exercise of This Court's Power of Supervision: Rule 19.

The procedures followed by the plaintiff in the District Court in this contempt proceeding have flagrantly flouted every concept of due process of law and required legal procedure. The only papers on file herein are the Rule to Show Cause, Petitioners' Demand for Jury Trial, and the transcript of testimony. There is no complaint or other pleading as required to commence the action (F.R.C.P. 3) to notify the defendant thereof (F.R.C.P. 4), or to advise defendant of what he has to defend against (F.R.C.P. 8).

With respect to the injunction order alleged to have been breached, the failure to make findings of fact and conclusions of law has already been noted in our petition for certiorari which was granted by this Court. What was stated there applies with equal force to this Petition, because no contempt order should be entered unless the order alleged to be violated is sufficiently clear as to leave no doubt in the mind of the alleged violator of the activities which are enjoined.

The District Judge, having ignored Rules 52(a) and 65(d) requiring findings, and refusing to clarify the injunctive order so that defendants were completely in the

dark, continued with this basically erroneous procedure by ignoring every one of the remaining basic rules, and requiring petitioners to enter into a case without knowledge of the claim or charge, without affording petitioners any opportunity whatsoever for preparation; and in otherwise violating the due process requirements. Moore's Federal Practice, Volume 2, p. 1783. In *Philippe v. Window Glass Cutters League*, 99 F. Supp. 369, involving a civil contempt, the court held that there should be a pleading directed to the Court which sets forth the acts or conduct allegedly constituting the contempt, that there should be reasonable notice to the one charged with the contempt and a specification of the acts or conduct allegedly constituting the contempt. Said the court:

> "In other words, the basic requirements of due process, notice and hearing, should be followed. The original pleading or 'accusation' should conform to the standards set by Rule 8, Federal Rules of Civil Procedure, 28 U.S.C.A., for the statement of a claim, wherein it is provided that a pleading 'shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled.' "

The actions of the District Judge totally ignored all of these requirements of due process, thereby setting up a trap which defendants could not escape. Yet, the Court of Appeals incredibly failed to consider or discuss this glaring failure of process and procedure. Thus, the Court below sustained a contempt order in the face of a record which established conclusively that the petitioners could not determine what acts they were allegedly prohibited from performing. This failure to follow the Rules of Civil Pro-

cedure most seriously violated petitioners' rights, indeed to the point where the union will be completely put out of business and destroyed by the order of the Court below.

More important, this departure from and indifference to the rules of procedure would undermine the due process requirements generally, and would tend to establish a rule based on the discretion and whim of individual judges without the protection of the due process requirements and the established rules of laws.

II. In Holding That the Union is Liable for "Mass Action" of Its Members Who Engaged in a "Wildcat" Strike, Despite the Fact That the Union Admittedly Exerted Every Reasonable Effort to Prevent and to Terminate the Work Stoppage, the Court of Appeals Below Came Into Direct Conflict With the Holding of the Court of Appeals for the District of Columbia in U.S. v. United Mine Workers, 177 F. 2d 29 (1949).

Although the District Judge held the petitioners in contempt only because the wildcat strike was a "mass action" which the union's repeated efforts could not prevent and terminate, and petitioners strongly contested this legal conclusion, urging that the Court of Appeals follow the decision of the District of Columbia Circuit, the Court of Appeals neither discussed, considered, nor passed upon this point. A Petition for Rehearing, pointing this out to the Court, was likewise unsuccessful in obtaining judicial consideration of this most significant issue.

At the trial, the respondents admitted that the union did not cause the wildcat strike, but did everything possible to avoid it and terminate it after it started. The District Judge made the specific finding that the individual members themselves stopped work in a "wildcat" action and that the union leaders urged them to return to work (226a-227a). He made it clear that the contempt order was *not* predicated upon the improper actions or inaction of the union

officers, but upon the lack of success in their efforts—that "they did not return to work" (227a). The union and its officers were held in contempt because the Court concluded that the union is automatically responsible for the "mass action of its members", despite the union's efforts against it.

The District Judge's "mass action" conclusion was a misapplication of a principle stated by the District of Columbia court in *United Mine Workers v. U.S.* 177 F 2d 29 (1949). In that case, the District Court had held a union in contempt as responsible for "the mass action of its members".[5] There was no evidence of any effort by union officials to prevent or terminate the strike. On appeal, the Court of Appeals affirmed, but made it very clear that such affirmance was because the union had sent *no* word to its striking members to return to work within the period involved (35). The Court said (at 36):

> "It seems plain enough that if Lewis had sent on April 5th telegrams of a directory or advisory nature . . . neither he nor the Union would have been guilty of contempt of the court's order. . . ."
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> • • •
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> ". . . we repeat that the Union was not convicted for causing the walk-out. It was convicted because it did not exercise, or attempt to exercise, whatever powers it had to cause its members to resume work. . . . Quite apart from what the miners did, the Union made no attempt to direct, instruct, or persuade them to return to work, and thereby it disobeyed the court's order."

Thus, the Court made certain that the "mass action" rule emanating from that District was impressed with a specific exceptive proviso where the union attempts to have the men return to work—just as occurred in the instant case. Thus, subsequently, when the same parties were again before the

5. 77 F. Supp. 563, 567 (D. C., 1948).

District Court in a contempt proceeding,[6] the same Court that announced the "mass action" rule pointed out that in view of the Court of Appeals' statement, where the record fails to demonstrate "either beyond a reasonable doubt or by clear and convincing evidence—that there has been wilful contempt of this court's order on the part of the Union", contempt does not lie (181); that

> "The record in this case is different from that in the 1948 contempt proceeding against the same respondent. *There* it was shown that the Union had 'made no attempt to restore normal production.' . . ."
>
> "Following the court's order in the *instant* case, various telegrams, letters, and other communications were sent by the Union to its district and local branches and members, instructing the miners to return forthwith to work.
>
> "This court does not hold that any telegram or combination of telegrams or letters would constitute a good faith compliance with an order directing action on the part of the Union. It does hold that, where the Union has sent communications such as are included in this record, the apparent good faith of such communications must be controverted *not by mere suspicion based on failure to obtain results,* but by *clear and convincing evidence,* if they are to be ruled by a court of law to constitute only a token compliance." (89 F. Supp. at 181) (Emphasis supplied).

As to the weight to be accorded to the evidence, the court made this significant holding:

> "It may be that the mass strike of Union members has been ordered, encouraged, recommended, instructed, induced, or in some wise permitted by means not appearing in the record; but this court may not convict on conjecture, being bound to act only on the

6. *U.S. vs. United Mine Workers,* 89 F. Supp. 179 (D.C., 1950).

evidence before it, which is insufficient to support a finding of either criminal or civil contempt.

"I therefore, find the respondent Union not guilty of civil or criminal contempt." (89 F. Supp. at 181)

Thus, it is obvious that the District Judge grossly misunderstood the "mass action" decision. The decision below has applied a legal principle without giving effect to its essential proviso, thereby erroneously convicting petitioners of contempt. The Court of Appeals failed to take cognizance of the rule, altogether. The issue is an important one and of an overwhelmingly recurrent nature, so long as free men will be permitted to give personal expression to their complaints and desires. If the broad swath cut by the affirmance below is permitted to stand, free individual expression will bear a penalty that organized labor will never survive. The decisions of the Third and District of Columbia Circuits stand opposed upon this important point. This conflict must be resolved by this Court upon review of this case together with the parent injunction proceeding in which this Court has already granted certiorari.

III. If the Basic Injunction Action Is Dismissed for Lack of Jurisdiction, The Order of Contempt and the Fine Must Necessarily Fall: U.S. vs. United Mine Workers of America, 330 U.S. 258.

If this Court should reverse the order in No. 892, the injunction aspect of the instant case, the order of contempt herein would also have to be reversed. In *United States v. United Mine Workers of America,* 330 U.S. 258, 91 L. Ed. 884, this Court stated on this very point:

"The right to remedial relief falls with an injunction which events prove was erroneously issued, Worden v. Searls, supra (121 US at 25, 26, 30 L. ed. 857, 858, 7S. Ct. 814); Salvage Process Corp. v. Acme Tank Cleaning Process Corp., (CCA 2d.) 86F. 2nd. 727

(1936); S. Anargyros, Inc. v. Anargyros & Co., (CC) 191 F. 208 (1911); and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court. Nor does the reason underlying United States v. Shipp, 203 US 563, 51 L. ed. 319, 27 S. Ct. 165, 8 Ann. Cas. 265, supra, compel a different result. If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety." (U.S. at 295, L. Ed. at 913)[7]

Therefore, the present contempt proceeding is abated by a termination of the injunction proceeding out of which it arose.

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7. In the Court below, respondent contended that the contempt order falls with the injunction *only* where a *compensatory* fine is ordered paid to plaintiff; and *not* where the order was to *coerce* defendant into compliance. This is clearly not the law. This Court has divided contempt orders into only two categories: civil, to remedy and criminal, to punish. The remedy can be to compensate the plaintiff *or* to coerce the defendant. Thus, in *Harris v. Texas and Pacific R.R. Co.*, 196 F. 2nd. 88, 89-90 (7 Cir., 1952) where in civil contempt, the defendant had been imprisoned, and no fine or compensation had been ordered, the Court said that, in accordance with the United Mine Workers case (quoting the First Circuit in *Parker v. U.S.*, 153 F. 2d 66, 71) (90): "Since the complainant in the main cause is the real party in interest with respect to a compensatory fine *or other remedial order* in a *civil* contempt proceeding, if for any reason complainant becomes disentitled to the further benefit of such order, the civil contempt proceeding must be terminated.' . . ." (90) (Emphasis supplied) The same situation exists in the instant contempt case, where the fine was also not compensatory, but coercive, and was, thus remedial.

IV. The Lower Court's Refusal to Grant a Jury Trial Violated the Act of 1948 And Was a Deprivation of Due Process and in Conflict with the Strict Policy Declared by This Court in Beacon Theatres v. Westover, 359 U.S. 500.

This Court has made it crystal clear and beyond doubt that the right to trial by jury is basic in our jurisprudence and that *any deprivation thereof must be most closely scrutinized.* Thus, in *Beacon Theatres v. Hon. Harry C. Westover, District Judge,* 359 U.S. 500, 3 L. Ed. 2d 988 (1959), a mandamus proceeding upon refusal to grant jury trial, Mr. Justice Black most emphatically declared:

> "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" (U.S. at 501, L. Ed. at 992)
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> • • • •
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> "... In the Federal courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it ..." (U.S. at 510, L. Ed. at 997)

The basic right to a jury trial is stated in the Constitution, Amendment Seven. Federal Rule of Civil Procedure 38(a) provides:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

More specifically, Congress has enacted a special legislation to be applicable in *all contempt actions* growing out of labor disputes. The Act of Congress of June 25, 1948, c. 645, 62 Stat. 844, 18 U.S.C.A. 3692, provides:

"§3692. *Jury trial for contempt in labor dispute cases*

"In *all* cases of contempt arising under the law of the United States governing the issuance of injunctions or restraining orders in *any* case involving or *growing out of a labor dispute,* the accused shall enjoy the right to a speedy and public trial by an *impartial jury* of the State and district wherein the contempt shall have been committed." (Emphasis supplied).

This clear and unequivocal language repels any distinctions which would cut the heart out of the letter and spirit of the Act. It covers all cases of contempt without regard to the nature of the contempt, so long as a labor dispute is involved.

At the outset of the contempt proceeding before the District Court on March 1, 1966, petitioners' counsel filed a written demand for jury trial, citing said statute. This was denied by the Court. The Court of Appeals held that the jury trial statute of 1948 is inapplicable because it applies only to injunctions in labor disputes, and that "*the order under review is not an injunction* . . . but an order . . . for specific performance of the bargaining agreement which made the award final and binding . . . Nor does it involve or grow out of a labor dispute". The Court rationalized that although there *was* a labor dispute between employer and union, nevertheless "it had been settled by the arbitrator's award . . . and was no longer alive"; that the order arose from the union's failure to comply with the Court's order. This is indeed an amazing conclusion in view of the record which establishes, beyond the shadow of a doubt, that the controversy was still raging and had resulted in a wildcat strike by members of the union, a strike which originated in a specific labor dispute *which did not even have its factual beginnings until long after the arbitration award.* It is hardly less than incredible that the Court could reach such a conclusion in the face of the evidence in this case. Moreover, in every case of contempt "in any

case involving or *growing out of a labor dispute*", the labor dispute necessarily becomes one step removed by the intervention of a basic order of injunction, or, as the Court terms it, of specific performance. In either situation, the case still involves or *grows out of* "a labor dispute". It is this same reasoning concerning the same injunctive order that is to be reviewed by this Court in the parent case, No. 892.[8]

The Court of Appeals has also attempted to circumvent the clear language of the Act by applying "natural inference" to deprive petitioner of jury trial. It holds that the 1948 statute took the subject matter of Section 3692 out of the Norris-LaGuardia Act and made it a part of the criminal code and that the "natural inference" is that this section is applicable only in criminal proceedings, and that the instant proceeding is civil. This "inference" ignores the clear, mandatory language of the Section, which specifically directs a jury trial in "*all* cases of contempt . . . in any case involving or growing out of a *labor dispute* . . ." (emphasis supplied). We must assume that "the legislative purpose is expressed by the ordinary meaning of the words used" *Richards v. U.S.*, 369 U.S. 1, 9, 7 L. Ed. 2d 492, 498 (1962). The intent that the section shall apply to *all* cases of contempt in labor dispute injunctions could not be more clearly or succinctly expressed.[9]

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8. This play on semantics and the reasoning of the court below was forthrightly rejected by the New York District Court in *Marine Transport Lines v. Curran*, 55 L C 11748 (2-27-67), as follows:

> "This is a labor dispute. Petitioner does not claim otherwise. The court is being asked to enjoin a work stoppage. This is the reality of the situation, whatever may be the form of the proceeding. To the extent that *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n.* (54 LC ¶ 11,393) 365 F. 2d 295 (3rd Cir. 1966), cert. granted, 35 U.S.L. Week 3277 (1967), is to the contrary, I decline to follow that decision."

9. To use the language of Chief Justice Warren in the *Richards* case (U.S. at 9, L. Ed. at 498): "We believe that it would be difficult to conceive of any more precise language Congress could have used to command application" of this section to *all* labor dispute contempt cases, civil or criminal "than the words it did employ" in this Section.

In face of such a clear mandate, only if a specific exception to this provision is statutorily declared, can a labor contempt case be insulated from this protection. Constitution of U. S., Amendment Seven; F.R.C.P. 38(a).

Further, the inclusion of Section 3692 in Title 18, U.S.C., does *not* limit its effect to cases of *criminal* contempt only. This section is a re-enactment of Section 11 of the Norris-LaGuardia Act, 29 U.S.C.A. 111. The only change is that while the original provision was limited to all cases arising "under this Act" (Norris-LaGuardia), the re-enactment is applied to all cases "of contempt arising under the laws of the United States governing . . . injunctions . . . in any case involving or growing out of a labor dispute." Therefore, Congress must be held to have intended that the language of the new section should derive its meaning from definitions supplied or reached under the Norris-LaGuardia Act, which was *not* limited to criminal contempt, but applied as well to civil. This Court has already made it clear that the general purpose of the 1948 revision of the Criminal Code was to codify and revise, *while preserving the original intent. U. S. v. Cook,* 384 U.S. 257., 16 L. Ed. 2d 516 (1966). A change in intent or application can be assumed only if there is a specific change of substantive language or some other "specific indication that Congress had receded from the intention it clearly expressed". Above all, the words must be given "their fair meaning in accord with the evident intent of Congress . . . as evidenced by common usage . . ." *Id.*[10]

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10. The same principle has been applied to the 1948 revision of the Judicial Code, 28 U.S.C.A. In *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 228, 1 L. Ed. 2d 786, 790 (1957), this Court said: "For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." The "natural inference" drawn by the Court below, in the instant case, clearly conflicts with this rule. The *only* change clearly expressed was to apply the jury right to "all" contempt proceedings growing out of labor disputes.

Thus, whether civil or criminal, since the case was for contempt growing out of a labor dispute, a jury was mandatory. Since petitioners were deprived of their essential right to trial by jury, the contempt hearing below was a nullity, and the contempt order and fine were void.

CONCLUSION.

The present, contempt aspect of this case presents issues which are of great significance, and are of a recurring nature. The labor injunction has become an every-day event, and the problems of compliance therewith rapidly follow. This case presents the problem in all of its aspects, both substantive and procedural. The Court below has failed to consider certain of the important issues, and has disposed of others in direct conflict with the pronouncements of this Court and in erroneous disagreement with other circuits. Unless reviewed by this Court, substantial misconception and confusion will persist and multiply.

Further, the instant proceeding is intrinsically bound up with the injunction aspect which this Court has already accepted for review. As petitioners pointed out to the Court below by petition for consolidation (which was refused) consideration of the contempt proceeding and order is essential to an understanding of the real intent and effect of the original injunction, which the District Judge refused even to explain. The contempt part of the case demonstrated that what had been termed an order "for specific performance of an arbitration award" was actually an injunction against work stoppage. This clearly appeared when the employers asked for a contempt order only when the men *refused to return to work*, and when the fine levied was $100,000.00 for each day that the men *refused to work*, and was ordered retroactively as punishment for *refusing to return to work*. This is what makes the action of the Court of Appeals so shocking.

If allowed to stand, the decision below, wholly erroneous and confusing, will condemn petitioner union to destruction. Certiorari should be granted and the case consolidated with No. 892.

Respectfully submitted,

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APPENDIX A.

Norris-LaGuardia Act, 29 USCA.

* * *

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions.

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70 (Norris-LaGuardia Act).

* * *

18 U.S.C.A.

* * *

§ 3692. Jury trial for contempt in labor dispute cases

In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court. June 25, 1948, c. 645, 62 Stat. 844.

Federal Rules of Civil Procedure

* * *

RULE 3.

COMMENCEMENT OF ACTION

A civil action is commenced by filing a complaint with the court.

SUPREME COURT CONSTRUCTIONS

Ragan v. Merchants Transfer & Warehouse Co., 1949, 69 S.Ct. 1233, 337 U.S. 530, 93 L.Ed. 1520.

RULE 4.

PROCESS

(a) *Summons: Issuance.* Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

* * *

(c) *By Whom Served.* Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpœna may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) *Summons: Personal Service.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. . . .

* * *

RULE 8.

GENERAL RULES OF PLEADING.

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

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RULE 38.

JURY TRIAL OF RIGHT.

(a) *Right Preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

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RULE 65.

INJUNCTIONS.

(d) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

APPENDIX B.

Decision and Contempt Order of District Judge. March 1, 1966

THE COURT: Gentlemen, this is a difficult case and one involving men who work on the docks.

We have an agreement and it is alleged that that agreement was violated. The matter came before me after the arbitration, after the arbitrator, Mr. Weiss, decided against the Union and its contention. The opinion of the arbitrator, Mr. Weiss, was upheld and I issued an order on September 15, 1965 enforcing that order.

Here we have men hired to do work and then they refuse under the conditions mentioned. They stop work and influence others not to report.

Both sides, of course, have a right to be here. That's the purpose of this Court.

I have heard the evidence presented and the arguments thereon. As long as the Union is functioning as a union, it must be held responsible for the mass action of its members. That means this: When the members go out in the manner in which they did and do an illegal act, the Union is responsible. They can't say, "We didn't do that as Union members." If members of the Union—then they do act under the laws of this country—if it is a mass action, the Union is responsible, and that's what we have here. It is a mass action along the Philadelphia waterfront, and it is illegal to strike under the circumstances, so the Union cannot escape responsibility on the basis that a leader or some of the leaders urged a man or some men or many men to return to work, but they did not return to work.

So in my opinion the Union in effect approved what was done and must be held responsible. They violated the order of this Court and therefore shall be adjudged in civil contempt. I hold the Union, the officers and the men who

participated responsible in contempt of court and at this time civil contempt only.

The fine against the Union will be $100,000 per day effective this date at 2:00 P. M., the first payment to be made within 24 hours to the Clerk of the United States District Court, and every day thereafter as long as the order of this Court is violated.

There will be a further hearing on this matter in the event that anything is desired to be presented by either or both counsel, and I will reserve the time, Monday at 2:00 P. M.

Exception noted.

(Concluded at 6:45 P.M.)

[Court of Appeals Appendix, 226a-27a]

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15804

PHILADELPHIA MARINE TRADE ASSOCIATION

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291,
Appellant

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 14, 1966

Reargued September 29, 1966

Before GANEY and SMITH, *Circuit Judges*, and KIRKPATRICK, *District Judge*

Opinion of the Court

(Filed November 17, 1966)

By KIRKPATRICK, *District Judge.*

This is an appeal from an order of the District Court holding the defendant union in contempt for violation of a previous order of the court. The order (affirmed by this court August 11, 1966) which was the basis of the contempt proceeding, directed the union to comply with an arbitration award in a dispute as to the proper interpretation of a term of its collective bargaining agreement with the Marine Trade Association. Sometime after the entry of

that order, a widespread work stoppage closing the Port of Philadelphia occurred because the men were dissatisfied with the arbitrator's award.

The Court, at 6:45 P.M. on March 1, after hearing, held the union responsible for the mass action of its members, adjudged it to be "in civil contempt only" and imposed a fine of "$100,000 per day effective this date at 2:00 P.M." (the time when the hearing began) "the first payment to be made within 24 hours . . . . and every thereafter (sic) as long as the order of this Court is violated." The record made before the trial court fully justifies the Court's finding that the mass action of the members of the union was, in fact, the action of the union. The union appealed the next day.

The character of the order, whether for civil or criminal contempt, was the subject of a reargument in this court. Of course, the fact that the judge called his action a judgment in civil contempt, though persuasive, is not conclusive. However, under the rule laid down by the Supreme Court in Shillitani v. United States, June 6, 1966, the judge was clearly right.

In the Shillitani case the court announced a perfectly clear, simple, and easily applied test for determining whether a penalty imposed in a contempt proceeding is for a civil or criminal contempt. The court said, "The test may be stated as: what does the court primarily seek to accomplish by imposing sentence?" It seems that in this case there can hardly be much doubt that the judge was primarily, if not solely, seeking to put an end to the strike, and that he may have had in mind some thought of punishment as well does not affect the nature of the proceeding.

The fact that the order of $100,000 per day was made "effective" at a time more than four hours past, with the first payment not due until the following day, is no indication that its purpose was punitive rather than coercive—rather the contrary. It would be hard to think of any good reason why the judge, if he was imposing a fine solely

as a punishment for a criminal offense, would date it back. On the other hand, it would be entirely logical for the judge in this case to fix a past hour as the effective date of his order so as to give a starting point for the first 24-hour period at the end of which the first payment was to be made.

Of the several points raised by the appellant the only one which merits extended notice is the contention that the union was entitled to a trial by jury and that the Court's refusal to comply with a written demand therefor was a deprivation of due process. Plainly, due process is not involved. What is involved, however, is whether it was error to deny the union a jury trial.

Title 18 U.S.C. 3692*, upon which the union bases its claim to a right of trial by jury, was originally a part of the Norris-LaGuardia Act. The union contends that it applies to all contempt proceedings growing out of a labor dispute but, on its face, it applies only to cases of contempt for violation of certain injunctions or restraining orders.

The order under review is not an injunction or a restraining order but an order under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, for specific performance of the bargaining agreement which made the award final and binding. This court has already so ruled. Nor does it involve or grow out of a labor dispute. There was a labor dispute between the plaintiff and the union, but it had been settled by the arbitrator's award in accordance with the bargaining agreement and was no longer alive. The order arose not from the labor dispute but from the union's conduct in failing to carry out the Court's order.

Moreover, Congress in 1948 took the subject matter of 3692 out of the Norris-LaGuardia Act and made it a part of the criminal code. The natural inference to be drawn from

* "In all cases of contempt arising under the law of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury."

that action is that Congress intended the protections provided by 3692 to be accorded to defendants in criminal proceedings and that that section is simply not applicable in cases of civil contempt in which the court is seeking only to obtain compliance with an order.

The order of the District Court will be affirmed.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,804

PHILADELPHIA MARINE TRADE ASSOCIATION

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291,
Appellant

(D. C. Civil No. 38647)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GANEY and SMITH, *Circuit Judges*, and KIRKPATRICK, *District Judge*.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court rendered orally in open court March 1, 1966 and in transcript filed March 2, 1966 be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF
Clerk

November 17, 1966

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,804

PHILADELPHIA MARINE TRADE ASSOCIATION

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291,
Appellant.

Sur Petition for Rehearing.

Present: STALEY, *Chief Judge*, MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH, FREEDMAN, SEITZ, *Circuit Judges*, and KIRKPATRICK, *District Judge*.

The petition for rehearing filed by INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291 in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

WILLIAM F. SMITH
Judge

Dated: January 6, 1967